

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 February 2004

CASE NO.: 2003-LHC-421

OWCP NO.: 07-160979

IN THE MATTER OF:

DANILO A. PERALTA,
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS,
Employer

APPEARANCES:

James E. Shields, Jr., Esq.,
On behalf of Claimant

Aldric C. Poirier, Jr., Esq.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901 *et. seq.* (2001) brought by Danilo Peralta (Claimant) against Northrop Grumman Ship Systems (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on October 28, 2003, in Metairie, Louisiana.

At the hearing both parties were afforded the opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs in support of their positions.¹ Claimant testified and introduced 34 exhibits, 17 of which were admitted, including: medical records and correspondence of Dr. Charles Murphy and Dr. Warren Bourgeois; various correspondence from Employer and Dr. Watermeier; Claimant's pharmacy bill; and the time graph used at the hearing.² Employer called Dot Moffet-Douglas and Dr. John Watermeier, and introduced 17 exhibits, which were admitted, including: various Department of Labor filings; Employer's payroll records of Claimant's earnings and wages; medical records of Advantage Physical Therapy, The Louisiana Clinic and Drs. Manale and Watermeier; medical records and depositions of Drs. Sanchez, Montz and Murphy; deposition of Claimant and Andre Labbe; Claimant's Choice of Physician Form; and Claimant's vocational assessment report.

Post-hearing briefs were filed by the parties.³ Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. An accident occurred on July 30, 2001;
2. Claimant's injury was in the course and scope of his employment;
3. An employer-employee relationship existed at the time of Claimant's accident;
4. Employer was advised of the accident on July 30, 2001;
5. Employer filed a Notice of Controversion on September 26, 2001;
6. An informal conference was held on March 23, 2002;

¹ References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX __, p.__; Employer exhibits- EX __, p.__; Joint exhibits- JX __, p.__.

² Employer objected to the admission of CX 19, 20 and 21, as inflammatory and irrelevant to the issues of this case. Accordingly, these exhibits were rejected. The remaining 14 Claimant's exhibits were rejected for being duplicative of Employer's exhibits.

³ Claimant submitted a 21-page, double spaced brief on December 19, 2003. Employer submitted an 18-page, double spaced brief on December 19, 2003.

7. Claimant's average weekly wage at the time of injury was \$563.88; and
8. Employer paid Claimant temporary total disability benefits from July 30, 2001, to May 13, 2002, in the amount of \$14,929.74.

II. ISSUES

The following unresolved issues were presented by the parties:

1. The nature and extent of Claimant's disability;
2. Choice of physician;
3. Date Claimant reached maximum medical improvement;
4. Claimant's entitlement to disability benefits and medical expenses;
5. Employer's liability for unpaid medical bills; and
6. Penalties.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant is a 41-year old permanent resident alien who first came to the New Orleans area from Honduras in 1990. He currently lives in Metairie, Louisiana, with his disabled father. Claimant is not married, but has one minor son for whom he pays child support. (Tr. 41, 102; EX 12, p. 2). Claimant testified he finished high school and some vocational training in medicine in Honduras. He also completed English as a Second Language courses at Delgado Community College in New Orleans. (EX 12, p. 3).

Claimant's employment history is confusing and at times contradictory. When he first came to the United States he worked for a few months as a kitchen helper and dishwasher at a Mexican restaurant. On July 5, 1990, he started working for Employer as

a painter, but quit on November 6, 1990.⁴ (Tr. 102-104). Claimant testified he was hired by Bolland Marine as a ship repairer, which he did for an undetermined amount of time.⁵ (EX 12, p. 4). Claimant then reapplied with Employer on September 4, 1997, and was hired as an outside machinist working in the engine room of ships. Claimant testified his job was heavy labor and required him to climb stairs, stoop and lift heavy objects. Claimant testified he worked 10 hour shifts for 5-7 days per week and earned \$15.45 per hour, although he later corrected himself and stated he earned \$14.54 per hour. (Tr. 41-43, 108, 158; EX 12, pp. 4, 5).

While working for Employer, Claimant took leaves of absence in 2000 and May, 2001, to return to Honduras and take care of family affairs. He took personal leave in June, 2001, to care for his father in Metairie, Louisiana. Claimant testified he did not miss any more work until his accident of July 30, 2001, although he admitted he was hospitalized on June 22, 2001, for a stomach virus and chest pains. He returned to work around July 9, 2001, but due to leg problems and a fever he was out of work again until July 16, 2001. Claimant testified that between July 16, and 30, 2001, he had no health problems. (Tr. 110-115).

Claimant testified on July 30, 2001, at 6:00 a.m. he and a handful of his co-workers, including Angus Fontaine, Albert Fonse, Jamie Saint Ann and Earl Jenkins, were in the shipyard office for their daily meeting when the foreman, John Perez, entered the room in an angry state yelling profanities. Perez threw his desk against the wall, and threw his chair behind him, nearly missing Claimant and his co-workers who were able to move out of the way. (Tr. 43-45; EX 12, pp. 6-7). After leaving the room to cool off, Perez returned still angry, and yelled directly at Claimant about the work he had finished the day before. Claimant testified Perez did not explain why he was angry. He threw his chair behind him a second time, hitting Claimant in the left knee. Claimant stated he did not know whether Perez tried to hit him, but after he hit him, Perez called Claimant stupid. The incident was witnessed by Claimant's co-workers and reported to the general superintendent over the radio. (Tr. 45; EX 12, pp. 6-7).

Claimant testified he never had any knee problems before July 30, 2001, but that the chair incident caused great pain and swelling in his left knee. He testified he

⁴ Claimant originally testified he worked at Employer for five years. He then gave different reasons for his quitting in November 1990. At the hearing, he testified he quit his job but then testified he injured his finger and did not return to Employer because he thought the work was too dangerous. At his deposition Claimant testified he left Employer because he wanted to learn a different job. (Tr. 104-105; EX 12, pp. 3-4).

⁵ Claimant testified he worked at Bolland Marine for 2 to 3 years. However, he also testified he reapplied to Employer in April 1991 and was discharged for falsifying his application. Although he was capable of reapplying after 30 days, Claimant went to work for Bolland instead. (Tr. 105-108).

immediately went to the first aid station, but it took him at least 20 minutes to get there because the pain in his left knee caused him to limp. (Tr. 44, 46; EX 12, p. 7). The first aid attendants filled out an accident report, gave Claimant a drug test, prescribed him Vicodin and gave him heat and ice treatment. Claimant testified his left knee had a bump on it and was swollen when he went to the first aid station, although he testified on cross-examination that the attendants did not notice any swelling or bruising. Claimant clarified the swelling and bruising happened after he left first aid and he had repeatedly told the doctors about it. Claimant also testified the first aid attendants gave him Naprosyn, not Vicodin. (Tr. 46, 117-118; EX 12, p. 8). The first aid attendants released Claimant back to his regular work on July 30, 2001, and Claimant worked full duty the entire week. On cross-examination Claimant clarified he returned to the first aid station every third day as instructed, however, he later testified he was unable to go every third day because he was too busy on the job. Claimant testified he was only written up once during the week after his accident, but it was unrelated to his knee injury. (Tr. 119-122).

Claimant testified he took his medication and worked through his knee pain until August 9, 2001. (Tr. 46-48; EX 12, p. 122). Specifically, Claimant had problems climbing stairs, standing for long periods of time and bending his left knee. Claimant's job required him to repeatedly climb six or seven flights of stairs while carrying a tool box which weighed about 60 pounds, which he had problems doing following his accident. He reported to the first aid station on August 9, 2001, and requested authorization to see a doctor of his own choosing. (Tr. 49-53; EX 12, p. 8). Claimant chose Dr. Manale from Employer's health insurance packet and saw him that same day. Claimant testified Dr. Manale related his problems to his work accident and prescribed him Vicodin and physical therapy. On cross-examination, Claimant acknowledged Dr. Manale noted he had full range of motion in his left knee with no swelling or bruising, but he clarified this was because he had been icing and elevating his knee at home. (Tr. 54-55, 122). After reviewing the MRI of Claimant's knee, Dr. Manale told him he had water in his knee. Claimant testified that Dr. Manale never told him he could go back to work, or that he did not need more treatment. (Tr. 56-57). On cross-examination Claimant testified he attended all of the physical therapy sessions prescribed by Dr. Manale, and attempted to perform all the exercises asked of him. He stated the physical therapy notes indicating he did not do the exercises are wrong. Claimant testified the therapist failed to note that he complained of pain during the bike exercise and a popping sensation in his knee when lifting weights. (Tr. 123-124).

When Dr. Manale retired he referred Claimant to Dr. Watermeier, who performed surgery on Claimant's knee on April 29.⁶ Claimant testified his knee condition worsened

⁶ On cross-examination, Claimant testified he saw Dr. Montz on April 25, 2002, but disputes Dr. Montz's finding of equal crepitation in both of Claimant's knees, along with his opinion Claimant's condition is not work related. Claimant testified he filed a complaint against Dr.

after the surgery; specifically, he developed a clicking in his knee and pain around the knee cap which he did not have before the surgery. Claimant stated Dr. Watermeier told him these conditions were complications from the surgery. Dr. Watermeier prescribed hydro-codone and physical therapy, but Claimant did not go because it was denied by Employer. Claimant acknowledged Dr. Watermeier's report of June 28, 2002, stated Claimant was temporarily totally disabled from his work accident which aggravated a pre-existing condition. Claimant testified Dr. Watermeier did not release him to work because he was restricted from bending, stooping, walking and climbing. He disputed Employer's allegation Dr. Watermeier released him to light duty work; however, he then testified he hired a new attorney when Dr. Watermeier released him to light duty work. (Tr. 57-63, 131, 132, 137). At his deposition, Claimant testified he was released from Dr. Watermeier's care for an unknown reason, although he had had a disagreement with the office ladies over the release of medical records. At the hearing, Claimant first testified he was released because "they got mad" at him and the doctor sent Claimant a letter indicating their conflict as reason for his release; on cross-examination, Claimant testified Dr. Watermeier told him he was not cooperative and he did not want to treat Claimant further. Claimant last saw Dr. Watermeier on June 26, 2002. (Tr. 64-66, 132, 139; EX 12, p. 10).

After he was released from Dr. Watermeier's care, Claimant hired a new attorney, who sent him to see Dr. Charles Murphy in September, 2002. Dr. Murphy indicated to Claimant that further treatment was needed, although another surgery was not necessary. Claimant testified Dr. Murphy related his physical condition to his accident, as an aggravation of a pre-existing condition. He released Claimant to light duty work, recommended physical therapy and prescribed Claimant a muscle relaxant. Claimant stated Employer denied these medical bills and prescriptions. (Tr. 67-68, 70, 132-133, 135, 141). On cross-examination, Claimant admitted Dr. Murphy said he could not do anything for him from an orthopedic standpoint, and advised Claimant to see Dr. Watermeier or make an appointment at Charity Hospital. At his deposition, Claimant testified he stopped seeing Dr. Murphy because he did not have the money to pay him. (Tr. 144-145; EX 12, p. 10). Claimant did not attend his appointment at Charity Hospital because he had no form of transportation to get there and could not afford to take the bus. (Tr. 146-147; EX 12, p. 13).

Claimant testified Employer stopped paying compensation on May 13, 2002, and told Claimant they had a light duty position for him. He attempted to return to work at Employer on August 1, 2002, and in October 2002, however, Employer would not let him work because he was taking Vicodin and Elavil which made him drowsy and dizzy. When he stopped taking Vicodin and returned to Employer in October 2002, he was not

Montz with the Board of Medical Examiners asserting he lied in his reports to sabotage Claimant's compensation claim. (Tr. 73, 128-129; EX 12, pp. 11-12).

hired because he was taking Celebrex and Amitriptyline which impaired his ability to work. Claimant testified first aid would not clear him to work, but they did not complete a physical examination. (EX 12, p. 9; Tr. 75-77, 82-85, 134). On cross-examination, Claimant testified he did not remember where he got the Vicodin. He stated Dr. Watermeier prescribed the hydro-codone, and he was still finishing out the prescription when he went back to Employer. (Tr. 135-140). Claimant also testified he could not work because of his physical condition, although he conceded nobody told him he could not return to work because of his physical restrictions. On cross-examination, he stated that at the time he went back to Employer in the fall of 2002 he was physically incapable of performing any work, even light duty. (Tr. 77, 80-81, 155-156).

Between October, 2002, and May, 2003, Claimant had no treating doctor and was not taking any medications. However, he also testified he took medication for two years, causing him stomach problems. He started seeing Dr. Bourgeois on May 13, 2003. Dr. Bourgeois noticed the clicking in Claimant's knee and indicated he needed further treatment from an orthopedic surgeon. He recommended medication and physical therapy and requested an MRI before considering surgery. Claimant testified Employer has denied Claimant's request to have Dr. Bourgeois as his treating physician and has refused to pay for any treatment by Dr. Bourgeois. (Tr. 71-72, 74, 148; EX 12, p. 11). Claimant testified at his deposition that Dr. Bourgeois took him off of Vicodin and Elavil, but that he did not return to Employer for work because they terminated him for taking a leave of absence. Furthermore, although Employer refused to compensate him for physical therapy, Claimant testified he has been doing home exercises prescribed to him, which have provided no relief. (EX 12, p. 12, 14).

Claimant testified he received a list of jobs from Employer in July, 2003, although the letter was dated May 11, 2003. The jobs listed included: valet driver, cashier, deli worker, security officer, bellman, room monitor and shuttle bus driver. Claimant testified he applied to the jobs, but none were available to him. Claimant stated his doctor did not approve any of these jobs. Additionally, he did not meet with Dot Moffett-Douglas or was even aware she was trying to contact him, but he testified he would have met with her if she requested. (Tr. 86-89, 92, 158-159). Claimant testified Moffett-Douglas sent him another letter dated September 30, 2003, with a list of many of the same jobs. Claimant searched out the jobs, but they had all been filled. (Tr. 94-95). Specifically, Claimant testified he applied for the valet position, but is not capable of driving cars and then running down 5-7 flights of stairs to park the next car. Additionally, the employer would not let him fill out an application because he was physically incapable of lifting heavy suitcases. Claimant applied at Danny & Clyde's and for the security officer and bellman jobs, but he did not receive any calls; he also did not know the physical requirements of these jobs. Claimant testified the room monitor job was not available and he does not know how to drive a shuttle bus. (Tr. 95-100).

Claimant testified he is not capable of performing any work in his present condition. He cannot work on his medications, and without his medications his knee hurts. Claimant stated he mostly stays home and cares for his parents and the heaviest thing he can lift is a grocery bag. He testified his doctors advised him losing weight would help improve his knee, and he has lost 10-15 pounds since his accident. (EX 12, p. 15; Tr. 156).

B. Testimony of Dot Moffett-Douglas

Ms. Moffett-Douglas is a vocational rehabilitation counselor employed by FARA Healthcare and retained by Employer; she was tendered and accepted by the court as an expert in the field of rehabilitation counseling. (Tr. 167). Moffett-Douglas prepared reports on May 22 and September 30, 2003, based on her review of Claimant's file, including his physical restrictions, work history and medical reports. Although she did not meet with Claimant personally,⁷ Moffett-Douglas was provided with Dr. Watermeier's correspondence dated April 17, 2003 and July 17, 2002, as well as medical records from Dr. Manale, Dr. Sanchez, and Dr. Montz. Moffett-Douglas based her report on Dr. Watermeier's April 17, 2003 letter restricting Claimant from kneeling, crawling, climbing and walking on uneven surfaces. His opinion Claimant was temporarily totally disabled and would reach MMI on or about November 29, 2002, did not affect her opinions. (Tr. 173-176, 168, 187-191; EX 11, p. 1). Moffett-Douglas was aware Dr. Murphy assigned Claimant restrictions of avoiding repetitive climbing, squatting, kneeling and lifting heavy objects, but released him to work light duty. (Tr. 168, 181). Moffett-Douglas did not know Claimant was treated by Dr. Bourgeois, but testified it is important to her opinion that she have all available medical reports. After reviewing Dr. Bourgeois' June 2, 2003 report, she noted he restricted Claimant from squatting, lifting and prolonged sitting or walking. He opined Claimant could perform only sedentary work. (Tr. 181-182).

Moffett-Douglas prepared a transferable skills analysis based on Claimant's job as an outside machinist, and found he had the transferable skills of a high school graduate, and possible alternate jobs for him included a locksmith, tune-up mechanic and a variety of jobs that provide on-the-job training. (Tr. 168). Moffett-Douglas did not receive a copy of Claimant's deposition until after releasing her second report, but it did not change her opinion regarding his transferable skills. (Tr. 169). She was able to locate several

⁷ Moffett-Douglas sent three letters to Claimant's counsel requesting a meeting with Claimant, one was dated July 7, 2003, and two were received on May 27 and July 28, 2003, respectively. As of September 30, 2003, it was her plan to meet with Claimant and his attorney to see how his job search was going. (Tr. 220, 222-223).

jobs in the New Orleans area which were available and suitable for Claimant. These jobs, descriptions and pay rate are set forth in the chart below:

Position	Employer	Description	Pay	Date Available
Valet driver	New South Parking Systems	Transport vehicles between lot and garages	\$6.50/ hr.	5/22/2003
Cashier/Deli Worker	Danny & Clyde's	Operate cash register or wait on deli customers	\$5.50/hr.	5/22/2003
Security officer	New Orleans Private Patrol	Private Security – desk or patrol officer	\$5.50- \$6.50/hr.	5/22/2003
Bellman	LaQuinta Inn	Greet and assist guests with luggage	\$5.50/hr.	7/17/2003
Room Monitor		Monitor convention rooms and check i.d. badges	\$7.50/hr.	7/17/2003
Shuttle Bus Driver	Treasure Chest Casino	Drive shuttle to transport people to and from casino	\$6.00/hr.	7/17/2003
Driver/Cashier	Park & Fly	Parking lot driver or cashier	\$5.50/hr	7/3/2003 - found Aug.- Sept. 2003
Security Officer	Bayou State Security	Armed or unarmed gate and patrol positions	\$5.50/hr	7/3/2003 - found Aug./Sept. 2003
Automobile Detailer	Marshall Bros. Lincoln Mercury	Detail and transport cars.	\$5.65/hr.	7/3/2003 - found Aug./Sept. 2003
Parking Booth Attendant	Job Service	Greet patrons, may open and close doors	\$7.00/hr	9/1/2003 – 9/6/2003
Cashier	Tropic Car Wash	Entry-level position	\$5.15/hr.	9/1/2003- 9/6/2003
Restaurant Host	La Corretta	Meet and greet customers, assign seats and review menu, Spanish helpful	\$5.15/hr.	10/28/2003
Fast food worker	McDonald's	Entry-level	\$5.15/hr.	10/28/2003

Restaurant crew member	Louisiana Works Job Service	30 hours, evening shift	\$5.50-\$6.00/hr.	10/28/2003
Bus person	Louisiana Works Job Service			10/28/2003

(Tr. 169-171; EX 11, pp. 4-5, 9-10). Moffett-Douglas testified the parking valet position required alternate walking, standing and sitting and was usually considered light duty. She would not recommend this job if Claimant's medication made him drowsy. The parking booth attendant job could be considered sedentary. While this and the security officer position required Claimant to pass a drug and alcohol test, none of the jobs required him to pass a full physical examination. (Tr. 197, 204-206, 211).

Moffett-Douglas testified there are usually several jobs of the type described which are available at any given time. Typical wages for restaurant workers are about \$5.50 per hour, while security guard positions usually pay \$6.00-\$8.00 per hour. (Tr. 172). She acknowledged Claimant had earned \$15.45 per hour at Employer, but the highest paid job she found only paid \$7.00 per hour. (Tr. 219).

Moffett-Douglas did not seek approval of these jobs from any of Claimant's doctors. She based her labor market survey on the medical records of Dr. Watermeier and Dr. Murphy and there was no indication that side effects from Claimant's medications would limit his ability to return to work. Moffett-Douglas testified she would look to the medical reports and doctor's opinions as to whether Claimant is capable to work while taking his medications. Based on Dr. Bourgeois' restriction of sedentary activity, she testified the cashier and parking booth attendant positions were suitable for Claimant. (Tr. 208-209).

C. Testimony and Medical Records of John Watermeier, M.D.

Dr. Watermeier testified he was familiar with Claimant's chart and Dr. Manale's medical records. He stated Claimant was struck in the knee with a chair and presented to Dr. Manale on August 9, 2001, with complaints of continued knee pain, tenderness, bruising and swelling since July 30, 2001. He was taking anti-inflammatory medication with no improvement and had difficulty climbing stairs and ladders. Dr. Watermeier testified there was no bruising, swelling or objective sign of trauma on this date, and Dr. Manale noted a full range of motion. However, Dr. Manale noted mild tenderness along the medial joint and moderate tenderness to palpitation over the medial collateral

ligaments. X-rays of Claimant's left knee showed good joint space, and Dr. Manale prescribed physical therapy, Vioxx and a stabilizing brace. He opined Claimant suffered a MCL sprain to the left knee. (Tr. 225-226; EX 7, pp. 34-35).

Claimant returned for a follow-up appointment with Dr. Manale on August 23, 2001, at which time Dr. Manale noted physical therapy was not helping Claimant's pain or range of motion. He indicated Claimant had almost full range of motion in his left knee, with moderate tenderness over the medial collateral ligament. He prescribed Vioxx and Vicodin and requested an MRI of the left knee. (EX 7, p. 36). Dr. Watermeier testified the MRI of Claimant's left knee, taken August 30, 2001, was normal but revealed a minimal amount of fluid in the left knee. The MRI also indicated possible chondromalacia, but was negative for a meniscal tear. (Tr. 227; EX 7, p. 51). Claimant followed-up with Dr. Manale on October 4, 2001. The notes indicate Claimant told his physical therapist he had a torn meniscus, but Dr. Manale informed the therapist Claimant's MRI was normal. Dr. Manale continued treating Claimant conservatively with physical therapy and medication, although he noted Claimant had continued complaints of tenderness and pain climbing and descending stairs. (EX 7, p. 37).

Claimant attended the recommended physical therapy, although Dr. Watermeier testified the therapist's notes indicated Claimant refused to perform the exercises because he was in too much pain. The therapist similarly did not note any swelling, bruising or objective sign of trauma. (Tr. 225-226). Claimant followed-up with Dr. Manale on November 1, 2001, presenting with tenderness at the medial joint line, a click from the patellofemoral joint and a slight limp in favor of the left knee. Claimant's pain worsened when he maneuvered stairs. In light of the amount of time that had passed since the accident and Claimant's normal x-rays and MRI, Dr. Manale recommended a diagnostic arthroscopy and refilled his medication. (EX 7, pp. 32, 48). Claimant returned to Dr. Manale on December 13, 2001, with complaints of popping, clicking and on-going knee pain and he continued to limp when walking. Upon physical examination, Dr. Manale found Claimant had a normal range of motion and stable ligaments, although he had marked tenderness over the medial side of the joint near the plica and the adjacent medial collateral ligament zone. Dr. Manale noted his concerns Claimant was not responding to physical therapy or medication nearly 4.5 months post-trauma, and diagnosed Claimant with a sprain or contusion of the knee with effusion. (EX 7, p. 33). On February 25, 2002, Dr. Manale sent a letter to Claimant's attorney indicating Claimant was disabled from his customary job of outside machinist. He suggested surgery as the most accurate way to diagnose Claimant; there was no explanation for the fluid found in Claimant's knee. *Id.* at 20-21.

Claimant followed-up with Dr. Watermeier on February 7, 2002, after the retirement of Dr. Manale. Dr. Watermeier noted Claimant's surgery had been denied, and he suffered from pain and additional depression from his inability to work. A physical examination revealed constant pain and tenderness on the medial side of the left knee;

range of motion was normal when Claimant was pushed and Claimant walked with a limp favoring his left knee. Dr. Watermeier diagnosed Claimant with a sprain and effusion of the left knee and refilled his prescriptions. (EX 7, p. 22). Claimant's next appointment on record was April 4, 2002. Dr. Watermeier noted Claimant walked with a limp and had some puffiness around the right knee. He noted tenderness over the medial side and plica area of Claimant's left knee, and refilled his medications. (EX 7, p. 9).

Despite physical therapy and medications Claimant continued to complain of pain. Dr. Watermeier noted there may be internal problems not identifiable by an MRI or x-ray, and indicated arthroscopy would be the next step in fully diagnosing Claimant's condition. Dr. Watermeier performed an arthroscopy on April 29, 2002; the operative report indicated a relatively smooth patella with little evidence of chondromalacia and a normal patellofemoral tracking. There was no evidence of subluxation, the medial compartment was free of lesions and there was no tearing of the meniscus or cartilage. Dr. Watermeier did remove Claimant's plica, a band of tissue normally asymptomatic. He testified trauma can cause the plica to swell, resulting in pain and irritation, but he did not say whether Claimant's plica was actually swollen; however, he testified Claimant's plica appeared to be in normal condition. Dr. Watermeier's post-operative diagnosis was plica syndrome. (Tr. 227-229; EX 7, pp. 6-7).

Dr. Watermeier testified there was no identifiable condition which could have been caused by trauma, although plica and chondromalacia could have been aggravated by trauma. The only verification he had of this was Claimant's past history of good health. (Tr. 229-230). However, Dr. Watermeier testified an aggravation of the plica or chondromalacia should have resolved itself anywhere between 4-6 weeks to 3-4 months after the trauma, or November 30, 2001. Additionally, Dr. Watermeier testified it was unusual that Claimant had severe unrelenting complaints of pain, but no objective evidence of same. He stated the arthroscopy was important to prove what Claimant did not have; he further testified Claimant's complaints were not caused by his trauma of July 30, 2001. (Tr. 230-231). However, on cross-examination, Dr. Watermeier related the aggravation of Claimant's plica to his work trauma, absent any history of knee problems. On re-direct he testified there is no objective evidence indicating the July 30, 2001 trauma actually aggravated Claimant's plica and chondromalacia. (Tr. 232, 235). However, in a June 19, 2002 letter to Claimant's attorney, Dr. Watermeier stated Claimant had pre-existing plica syndrome which was aggravated by trauma. He suggested treatment including progressive range of motion and strengthening exercises and non-narcotic pain medication where necessary. (CX 29, p. 1).

Dr. Watermeier testified the clicking in Claimant's knee developed after the surgery, and was probably a latent reaction to the same.⁸ He expects it is a temporary

⁸ I note Dr. Water Meier testified early that Dr. Manacle discovered clicking in Claimant's knee on December 13, 2001, four months prior to the arthroscopy. (EX 7, p. 33).

condition, which may have been an aggravation of his original problems. (Tr. 231-232). Claimant returned for a follow-up appointment with Dr. Watermeier on May 9, 2002, presenting with pain, tenderness and swelling in his left knee; Claimant had a moderate limp and used crutches to ambulate. Claimant's range of motion was 0-90 degrees in flexion. Dr. Watermeier recommended physical therapy and medications. (EX 7, p. 10). The medical records indicate Employer stopped Claimant's compensation and medical benefits on May 24, 2002. (EX 7, p. 16). Claimant followed up with Dr. Watermeier on June 26, 2002, presenting with constant complaints of moderate knee pain. Dr. Watermeier noted a clicking on the patellofemoral joint and that Claimant walked with a painful gait. He recommended treatment of medication as well as review and observation by a physician. Dr. Watermeier refilled Claimant's prescriptions for Vioxx and Vicodin through July 2002. The last prescription was written in July, 2002, and was for a 30-day supply, with no refills. (Tr. 236; CX 1, p. 1). At the hearing, Dr. Watermeier acknowledged he recommended physical therapy for Claimant on June 26, 2002, which had not yet been authorized. He testified this recommendation continues, stating Claimant also needs to be under the care of an orthopedic surgeon to manage his medication. Dr. Watermeier deferred to Dr. Bourgeois' opinions regarding Claimant's orthopedic condition as of June 3, 2003. (Tr. 233-234). He testified Dr. Bourgeois' records show he related Claimant's pain to his history but he did not find any physiological explanation for the complaints. (Tr. 235).

On August 14, 2002, Dr. Watermeier withdrew as Claimant's treating physician due to Claimant's "fail[ure] to cooperating with this office." (CX-27, p. 1).

D. Exhibits

(1) Employer's Medical Records

Claimant presented to Employer's first aid facility on July 30, 2001, with left knee pain secondary to an accident. There was no swelling or bruising of Claimant's knee, although he did experience pain on palpitation. Claimant did not limp while walking. The first aid doctor prescribed Naprosyn for one week. Claimant returned to first aid the following day, July 31, 2001, with the expected soreness and slight swelling, but no palpable abnormalities. (EX 2, p. 2).

(2) Deposition and Physical Therapy Records of Andre Labbe

Labbe has been a licensed physical therapist for twelve years, and has been with Advantage Physical Therapy for the past four years. In addition to being a staff physical therapist, Labbe owns Advantage and is the director of clinical services. (EX 15, pp. 5-6,

14). Labbe testified Claimant was seen by himself and therapists Chris Mummelthey, Tracy Pacauchio and Mike McNeal who worked as temporary therapists at Advantage. At Claimant's initial evaluation on August 10, 2001, Mummelthey found limited range of motion in Claimant's left knee, but could not test his quadriceps secondary to pain. Claimant's overall pain was an eight out of ten, and he was functionally unable to work, climb stairs, squat or carry. *Id.* at 13-18. Mummelthey noted Claimant had poor pain tolerance. However, she did not find any skin discoloration. Claimant's right knee measured 2 centimeters larger in girth than his left knee, which Labbe testified could indicate a loss of muscle activity on the smaller side. On cross-examination he testified it is not abnormal to have different knee sizes. *Id.* at 19-21, 59. Claimant returned for physical therapy on August 14, 15, 17, 20, 22 and 24, 2001. His condition was essentially unchanged; Claimant had pain and tenderness which he described as a "pulling sensation", no signs of effusion or atrophy and his range of motion was limited by pain and guarding. (EX 10, pp. 9-10, 14-21).

Labbe first saw Claimant on August 27, 2001, although he was already familiar with his file. At this session, Claimant complained of severe left knee pain and was unable to perform a full revolution on the bike, which was not unusual.⁹ Labbe next saw Claimant on August 29, 2001, and at his follow-up on August 31, 2001, he noted Claimant complained of severe pain in his medial left knee and expressed bitterness toward Employer. He could bend his left knee 95 degrees on the leg press, but only 40 degrees on the bike; Labbe testified he did not understand the discrepancy. (EX 15, pp. 29-31). On September 4, 2001, Claimant presented with minimal swelling and on September 7, 2001, Claimant had improved range of motion which Labbe testified could not be manipulated. *Id.* at 32-33.

On September 10, 2001, Claimant presented with no swelling but complaints of severe pain and mild tightness in his left knee. Labbe testified he had no explanation for Claimant's lack of improvement, other than pain. He noted Claimant had poor pain tolerance, and was unable to walk, climb stairs, squat or carry heavy items. Labbe testified he could not conduct any special tests due to Claimant's guarding of his left knee. *Id.* at 35. (EX 10, p. 12). Claimant returned for physical therapy on September 13, 2001, and Labbe noted Claimant had good muscle tone in his left quadriceps. Labbe testified this is an objective finding, and a good sign of progress. However, he stated Claimant got upset upon that finding, claiming his quadriceps had nothing to do with his knee injury. Labbe did not find it unusual that Claimant got upset, but testified it may have been exaggeration on Claimant's part. (EX 15, pp. 36-37, 43).

On September 17, 2001, Claimant refused to perform the bike and leg press exercises, secondary to complaints of pain. Labbe testified it was rare for patients to

⁹ Labbe testified the therapists only record objective findings every third visit, or after the Claimant visits his doctor, but not at every physical therapy session. (EX 15, p. 28).

refuse to try exercises. Similarly, at his next appointment on September 19, Claimant could not do any of the exercises secondary to pain. On September 21 and 24, 2001, Claimant reported to Labbe that he had a torn meniscus, but was able to complete the exercises. *Id.* at 39-41. However, on September 26 Claimant did not want to do the exercises and on September 28 he complained of increased pain. *Id.* at 41-42.

Labbe sent a progress note to Dr. Manale on October 3, 2001, stating they had used modalities to help ease Claimant's pain, but that he continued to complain of severe pain and thought his left knee was "really messed up." Claimant had no swelling and fair quad tone, but was under the impression he had a torn meniscus. Dr. Manale replied that Claimant's MRI was negative for a torn meniscus. At his October 5, 2001 appointment Claimant could do the exercises but became very upset upon learning his MRI was negative, and requested a second opinion. (EX 10, p. 38; EX 15, p. 45). The physical therapy records indicated no significant change in Claimant's condition at his October 8, 10, 11, 15 or 17, 2001 sessions. October 19, 2001, was seven weeks after Labbe first started treating Claimant and there was no change; Labbe testified it was unusual to see continued and increasing complaints of pain after this amount of time. Claimant's condition remained unchanged at his remaining appointments on October 23, 25, 29 and 31, 2001. (EX 10, pp. 41-50; EX 15, pp. 48-49).

On cross-examination, Labbe testified physical therapy is beneficial to knee injuries, and is very important after a knee operation to restore motion and promote the healing process. He stated each knee heals differently and while physical therapy is not the only way to heal, studies indicate a person has a better chance of healing with physical therapy. Labbe testified he did not diagnose Claimant's condition, but is trained to address subjective pain complaints with modalities; he stated pain medication may affect how a person reacts to physical therapy but denied knowledge of Claimant's medications. (EX 15, pp. 52-63).

(3) Deposition and Medical Records of Fernando L. Sanchez, M.D.

Dr. Sanchez has been board certified in orthopedic surgery since 2000, specializing in hips and knees. He testified by deposition on June 4, 2003.¹⁰ He examined Claimant once on October 31, 2001, as a second opinion requested by Employer's claims adjustor. At the examination, Claimant provided Dr. Sanchez with a history of pain over the medial side and anterior aspect of his left knee which affected his ability to conduct daily activities. He described the pain as a severely sharp, locking and tearing sensation inside his knee which became worse when he maneuvered stairs. Claimant was being treated by Dr. Manale who prescribed physical therapy and a knee

¹⁰ Claimant's attorney was not present at this deposition. (EX 13, p. 2).

brace, but his condition was not improving. Dr. Sanchez noted Claimant suffered depression right after the accident. (EX 13, pp. 1-3; EX 9, pp. 10-11).

Upon physical examination, Dr. Sanchez found Claimant to be 5'7", 230 pounds and walked with a limp favoring his left leg. He had discomfort and pain over his distal medial femoral condyle, but there was no effusion, patella tracking was normal and his knee was stable. Dr. Sanchez testified Claimant guarded his knee a fair amount, and his complaints of "excruciating pain" made it difficult to conduct a complete exam. (EX 13, pp. 2-3; EX 9, p. 10). Dr. Sanchez testified he could not think of any injury which would cause a person as much pain as Claimant experienced, except possibly a patella fracture. Claimant's x-rays showed only minimal chondromalacia, which was not a justification for his pain level. After reviewing the August 30, 2001 MRI, Dr. Sanchez noted mild effusion and chondromalacia in Claimant's knee, but testified there were no acute abnormalities to explain his pain. (EX 13, p. 3).

Dr. Sanchez testified reflex sympathetic dystrophy (RSD) can cause excruciating or otherwise abnormal responses to pain, but he stated Claimant did not exhibit any of the associated symptoms of the condition; he had no dysesthesia, paresthesia or discoloration of the skin. *Id.* at 3-4. Dr. Sanchez opined Claimant had patellofemoral chondromalacia aggravated by his work incident. This is a common condition which produces discomfort but should not limit a person's daily activities. Dr. Sanchez testified he thought Claimant could return to work full-duty as of October 31, 2001. *Id.* at 4.

Dr. Sanchez reviewed Dr. Watermeier's operative report which found little evidence of chondromalacia and diagnosed Claimant with plica syndrome. Dr. Sanchez testified plica is normal tissue inside the knee's medial compartment found in about 10-15% of the general population. When it becomes symptomatic it may cause pain on the medial side or a sensation of snapping or giving way. Dr. Sanchez testified he agreed with Dr. Montz's findings that Claimant's plica was not caused by his work accident, although it may have been aggravated by such. However, he then stated Claimant's clinical picture did not fit that category; even if the accident aggravated Claimant's plica or chondromalacia, the symptoms should only last a short period of time and should not inhibit daily activities. Dr. Sanchez testified plica syndrome would explain Claimant's pain, but was not a work-related injury. He emphasized there was no medical or scientific explanation to correlate Claimant's symptoms with his physical examination, MRI or x-ray. (EX 13, pp. 5-6).

(4) Deposition and Medical Records of John R. Montz, M.D., F.A.A.O.S.

Dr. Montz has been board certified in orthopedic surgery since 1981. He performed an independent medical examination of Claimant on March 25, 2002, at the

request of the Department of Labor. (EX 14, pp. 5-6). Claimant presented with discomfort on the medial, or inside, left knee adjacent to his kneecap. The pain was worse on stairs and his knee locked, swelled and had given away twice. Claimant provided Dr. Montz with a history of being injured when his supervisor threw a chair, hitting him in the left knee. He was able to walk to first aid and work for one week before the pain became too much to bear. He stopped working on August 8, 2001, and started treatment with Dr. Manale who prescribed physical therapy, hydro-codone and Vioxx. Claimant also informed Dr. Montz he was treated by Dr. Aristimuno for depression following the work accident. (EX 14, pp. 6-7).

A physical examination conducted by Dr. Montz showed Claimant was 5'7" and 230 pounds. Claimant did not use a walking aid and Dr. Montz did not note any bruising, discoloration, scars, swelling or effusion in his left knee. Dr. Montz testified he found crepitation in the superior patella equal in both knees and tenderness over Claimant's medial posterior meniscal area. X-rays showed normal joint space and a well-aligned patella. After reviewing the August 30, 2001 MRI, Dr. Montz testified it was positive for lateral patella chondromalacia. (EX 14, pp. 8-9; EX 8, p. 60). After examining Claimant, reviewing his films and Dr. Manale's records, Dr. Montz opined Claimant suffered chondromalacia of the patella which was aggravated by contusion. However, he testified there was no bruising or swelling to evidence a contusion. Dr. Montz noted medial joint line tenderness would support a sprain or contusion of the medial side of Claimant's knee, but he was uncertain about the relationship, if any, between Claimant's injury and his clinical findings. He opined Claimant was not at MMI because he had consistent complaints since the date of his injury. Dr. Montz testified he gave Claimant the benefit of the doubt and recommended a diagnostic arthroscopic surgery. (EX 14, pp. 9-10; EX 8, p. 59).

Dr. Montz testified he wrote an addendum to his report on April 15, 2002, after reviewing Dr. Sanchez's October 31, 2001 report. Dr. Montz noted in his addendum, and testified at the hearing, that Claimant's symptoms were more compatible with patella chondromalacia which probably was not related to his work injury. He recommended Claimant should not work at heights or climb ladders or stairs. (EX 14, pp. 11-12; EX 8, p. 57). In another addendum dated April 22, 2002, after reviewing the MRI films, Dr. Montz again opined Claimant's condition was not job related. After reviewing Dr. Watermeier's operative report, Dr. Montz wrote an addendum to his report opining Claimant's condition was not caused by contusion-aggravated chondromalacia. Dr. Montz testified synovial plica is a normal knee structure which becomes symptomatic as it thickens; it is frequently associated with people doing repetitive knee activities. He also testified most people with synovia plica syndrome do not have as severe complaints as Claimant's. (EX 14, pp. 13-14; EX 8, p. 56).

Dr. Montz testified it was more likely than not that Claimant's complaints were not related to his injury by chair. He supported this opinion by stating there was no objective

evidence of Claimant being hit in the knee and weeks of anti-inflammatory medication and physical therapy did not improve his condition. Dr. Montz had no explanation for Claimant's lack of improvement. If the accident had aggravated Claimant's pre-existing plica or chondromalacia, Dr. Montz opined it would have healed within 6-12 weeks with pharmaceutical and physical therapy treatment. On cross-examination he testified being hit in the knee should only cause a temporary flaring of the chondromalacia or plica. He would have expected significant improvement by March 25, 2002. Dr. Montz testified there is no physiological reason to explain Claimant's consistent complaints of severe pain. (EX 14, pp. 15-19, 23).

On cross-examination, Dr. Montz testified he only saw Claimant once in March 2002, and acknowledged that every knee is different and people heal differently; it is difficult to heal a knee 100%. Dr. Montz also acknowledged there may be no physical findings of a contusion ten months after the incident. However, Dr. Montz also testified laborers will have more symptoms with their knees. He reinforced his opinion that Claimant's synovial plica and chondromalacia found by Dr. Watermeier were not reasonably related to his work accident. While these symptoms could have been aggravated by a contusion, Dr. Montz re-stated such aggravation should only be temporary in nature. (EX 14, pp. 20-23). Dr. Montz further testified physical therapy is a reasonable and necessary part of surgery. He stated arthroscopy and excision of the plica is a minor procedure, and Claimant should be at MMI one year post-surgery. Dr. Montz emphasized his opinion that the plica resection was not necessitated by Claimant's work trauma, and he does not feel Claimant's chondromalacia or thickened plica was caused by the chair incident. (EX 14, pp. 24-26, 30-31).

Dr. Montz also testified on cross-examination that mental problems may inhibit physical improvement. His records included a note from Dr. Aristimuno dated February 13, 2002, indicated he diagnosed Claimant on January 4, 2002, with depression reactive to his recent work accident. Dr. Montz also clarified his restrictions of April 15, 2002, advising Claimant against prolonged climbing, standing, crawling or carrying heavy objects, were based solely on his subjective complaints of pain. (EX 14, pp. 29-30; EX 8, p. 7).

(5) Deposition and Medical Records of Charles P. Murphy, M.D.

Dr. Murphy is a board-certified orthopedic surgeon who practices predominantly in the field of sports medicine, focusing on knees and shoulders. He testified by deposition on July 10, 2003. Dr. Murphy examined Claimant on September 25, 2002, for an orthopedic evaluation of the knee as requested by Claimant's attorney. Dr. Murphy

testified he was under the impression he was providing a second opinion for Claimant's condition. (EX 16, pp. 6-7, 38).

At the time of the examination, Dr. Murphy reviewed Claimant's medical records, including those of Dr. Watermeier, Dr. Manale, the second opinions, physical therapy reports, and the x-rays and MRI reports. The August 30, 2001 MRI showed a mild amount of free fluid in the knee with some lateral chondromalacia of the patella. The arthroscopy revealed minimal chondromalacia and a synovial plica. Claimant provided him a history of constant, dull pain around his kneecap which worsened on stairs, and which he related to a work injury on July 30, 2001. Prior treatment including arthroscopic surgery did not help. Claimant did not receive post-operative physical therapy and he continued to have constant aching over his anterior aspect of the knee. He was taking Vicodin, Vioxx and Roloids for heart burn. (EX 16, pp. 8-11; CX 14, pp. 1-2).

A physical examination conducted by Dr. Murphy showed Claimant was 5'7" and weighed 230 pounds; he walked with a moderate limp even when using a knee brace. Dr. Murphy noted well healed arthroscopy scars and normal skin. There was no joint effusion, but Claimant had significant tenderness over the patella and some soreness at his joint lines. Dr. Murphy testified the crepitation he found in Claimant's knee was consistent with either chondromalacia or post-surgical scarring within the knee. He also noted poor muscle tone in the quadriceps, which can be a sign of disuse. (EX 16, pp. 11-12, 14-15). X-rays obtained by Dr. Murphy were unremarkable, showing no swelling, bruising or objective sign of trauma. (EX 16, p 13; CX 14, p. 3).

Dr. Murphy testified anterior knee pain can be a complex and frustrating condition. He opined Claimant's symptoms were due in part to his weak quadriceps. Dr. Murphy described medial plica syndrome as tissue within the knee joint which is relatively normal, although can become a source of pain. The plica can thicken after trauma which was consistent with Claimant's pain, although Dr. Murphy testified there was no clear explanation for his continued severity of pain. Dr. Murphy testified it was more probable than not that Claimant had chondromalacia and plica before his accident, and that his symptoms were associated with his chair incident. (EX 16, pp. 16-19). However, Dr. Murphy also testified chronic knee pain is a "well-documented knee condition" which can occur with or without trauma. He acknowledged pain is purely subjective, but he would have expected Claimant to react to treatment better. *Id.* at 20-21, 23. On cross-examination, Dr. Murphy testified there is no simple solution to anterior knee pain and residual effects are not uncommon; knees do not always heal to 100% and physical therapy or exercises can be very important to the healing process. *Id.* at 46-47.

Dr. Murphy stated chronic knee pain can develop after a patella fracture or severe contusion or fall. However, he testified if there was absolutely no swelling or bruising of Claimant's knee, then it is highly unlikely that his work incident triggered his knee

condition. Moreover, if Claimant worked heavy manual labor for a full work week following his trauma, then it indicated to him that his initial injury was not severe and probably did not cause his anterior knee pain. *Id.* at 23-24, 32-33. Dr. Murphy testified he found Claimant's complaints of severe pain "all day every day" unusual, and not supported by the physiological evidence. In his experience, individuals with pre-existing plica or chondromalacia who then sustained trauma did not experience such severe pain as long as Claimant. He testified knee traumas generally resolve within 6-8 weeks. Dr. Murphy acknowledged contusion-aggravated plica or chondromalacia can become a long-standing condition; however, while a person may experience long-term pain for life, it generally is not of the degree of severity which Claimant complains of. *Id.* at 29, 40-42. On cross-examination, Dr. Murphy testified Claimant's condition is related to his injury, based on the history he provided of no prior knee injuries. He added trauma can cause a congenital defect to become severe and chronic. *Id.* at 54.

Dr. Murphy testified he suggested removing Claimant from his narcotic medications and prescribed a trial of Celebrex. He also suggested Claimant try Elavil, which is an anti-depressant that sometimes helps with pain. Dr. Murphy noted chronic pain usually has a psychological overlay and he recommended Claimant see his primary care physician for possible depression treatment. Dr. Murphy further testified he felt physical therapy was Claimant's best treatment option. On cross-examination, he testified there was nothing unusual in Claimant's physical therapy notes other than he did not respond to the treatment. He opined Claimant was physically capable of performing physical therapy. *Id.* at 24-27, 34, 57. Claimant followed-up with Dr. Murphy on October 11, 2002, with similar complaints. Dr. Murphy suggested he try to seek physical therapy through the Medical Center of Louisiana at Charity Hospital, although he testified it was not readily available. He also prescribed Claimant home exercises and stretches which could be helpful absent formal physical therapy. *Id.* at 35-36.

Dr. Murphy testified he did not question the genuineness of Claimant's complaints of pain. He restricted Claimant from repetitive climbing, squatting, kneeling and heavy lifting, and released him to light duty work. On cross-examination, Dr. Murphy testified Claimant could work standing all day. He clarified a person with a major knee injury is not going to be able to work heavy manual labor, even with complaining, although it is possible to adjust to living with minor pain. *Id.* at 27, 50.

(6) Medical Notes of Warren R. Bourgeois, III, M.D.¹¹

Dr. Bourgeois initially treated Claimant on May 1, 2003, when Claimant presented to him with persistent parapatellar pain in his left knee. Claimant stated he was struck in the left knee on July 30, 2001, while he was at work, and has had significant pain in weightbearing activities since that date. Arthroscopic surgery was performed for a diagnosis of chondromalacia patella and ligamentum mucosum hypertrophy. Claimant stated he has not worked since the accident or had any physical therapy. (CX 13, p. 1).

A physical examination by Dr. Bourgeois revealed no swelling and only a minimal loss of flexion in Claimant's left knee. Dr. Bourgeois noted mild patellofemoral joint crepitation and atrophy of the left quadriceps. He also noted mild plica tenderness adjacent to the medial side of the patella. X-rays obtained were normal. Dr. Bourgeois' impression was Claimant suffered from chondromalacia patella and plica synovitis of the left knee. Dr. Bourgeois reviewed Claimant's medical records, in particular the correspondence and reports of Dr. Watermeier diagnosing Claimant with malalignment of the patella with subluxation and indicating he excised the medial plica and ligamentum mucosum anterior in the April 29, 2002 arthroscopy. Dr. Bourgeois disagreed with Dr. Watermeier's diagnosis of maltracking of the patella, as he found no maltracking during his examination or on the x-rays taken. He recommended physical therapy. *Id.* at 1-2.

Claimant followed up with Dr. Bourgeois on May 29, 2003, at which time no physical therapy had been undertaken and Claimant had persistent complaints of parapatellar pain. Claimant stated the anti-inflammatory medication was not helping and he was becoming depressed over his condition and inability to work. Dr. Bourgeois' physical examination revealed no new conditions and he requested an updated MRI of Claimant's left knee. He prescribed Lodine and Ultram, and limited Claimant to sedentary activity with no squatting, lifting or prolonged sitting or standing. Based on Claimant's history, Dr. Bourgeois related his current condition "entirely to the trauma sustained on July 31, 2001." *Id.* at 2.

¹¹ I note the only medical "record" of Dr. Bourgeois admitted into evidence is a June 3, 2003 letter he sent to Claimant's attorney. Dr. Bourgeois indicated in this letter that he does not have complete copies of Claimant's medical records regarding his knee injury. The court has not been provided a complete set of updated records from Dr. Bourgeois and it is not known exactly what information he is basing his opinions on. He did not testify at hearing or by deposition. Therefore, I place very little weight on his opinions which are not corroborated by the record.

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends he is entitled to physical therapy and pharmaceutical treatment as a reasonable and necessary course of treatment following his arthroscopic surgery. Claimant argues all orthopedic surgeons who treated or examined him commented physical therapy is an important part of recovering from arthroscopy and recommended a course of medications. He contends such follow-up treatment is clearly guaranteed by the Act, especially since Claimant developed a clicking post-surgery. Claimant also argues Employer is required to approve Dr. Bourgeois as his choice of physician because Dr. Watermeier refuses to treat him, but all doctors recommended he continue treatment under an orthopedic surgeon. Claimant asserts Employer arbitrarily and capriciously cut of medical and compensation benefits on May 13, 2002, at which point he had not yet reached maximum medical improvement and was unable to return to his former job. He contends Employer failed to establish suitable alternative employment. Furthermore, Claimant was not at MMI when these jobs were available and Moffett-Douglas admitted some of the jobs were unsuitable for Claimant given Dr. Bourgeois' restriction of sedentary activity only. In the alternative, Claimant contends he is entitled to compensation at least through May 22, 2003, when Employer first attempted to establish suitable alternative employment.

Employer contends Claimant should be deemed an incredible witness due to his incredulous and contradictory testimony. Notwithstanding Claimant's credibility issue, Employer argues he did not suffer a work-place injury because in the weeks and months following his chair incident no doctor or therapist noted objective evidence, such as swelling or bruising, to suggest Claimant sustained trauma to his knee. In the alternative, Employer asserts Claimant only sustained a minor aggravation of his pre-existing chondromalacia or plica which resolved itself by November 30, 2001. Employer further contends Claimant is not disabled from a workplace injury because the doctors all testified his condition is not related to a workplace injury. Any impairment rating which could be assigned Claimant's knee would only be based on his subjective complaints of pain and not supported by any objective medical evidence. Finally, Employer contends it went beyond its duty set forth in Fifth Circuit precedent to establish suitable alternative employment by locating several jobs available to Claimant. As such, it asserts Claimant is not entitled to further compensation from Employer.

B. Claimant's Credibility

Employer contends Claimant is an incredible witness who has difficulty telling the truth. It pointed the undersigned to specific points in the trial transcript where Claimant gave unbelievable testimony and emphasized Claimant's inability to differentiate fact from fiction. It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999). Additionally, a "[c]laimant's lack of candor in peripheral areas of testimony does not render his testimony incredible, . . . does not deprive of substantial evidentiary support the administrative law judge's holding in reliance on that testimony as well as the more relevant medical testimony, and does not make the holding 'inherently incredible or patently erroneous.'" *Pernell, v. Capitol Hill Masonry*, 11 BRBS 532 (1979)(quoting *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335 (9th Cir. 1978)).

I note there were several points in Claimant's testimony where he contradicted his prior hearing or deposition testimony, or the rest of the record. Specifically, Claimant gave different answers regarding his reasons for leaving Employer in November, 1990. He testified he left to find another job, and then he stated he was injured and did not return because it was too dangerous. At his deposition Claimant testified he worked for Bolland Marine for 2-3 years after leaving Employer but at the hearing he said he reapplied in April, 1991, and worked until June, 1991, when he was fired for falsifying his application. It was then that he worked at Bolland before reapplying at Employer in September, 1997. Claimant also gave contradictory testimony regarding his employment record during the months leading up to his July, 2001, injury. He testified he took leaves of absence in 2000, and May, 2001, to return to Honduras. However, he had to be reminded on cross-examination about his leave of absence in June, 2001, to care for his father, his hospitalization June 22, 2001, for chest pains and his absence in July, 2001, for leg pains and fever. Specifically, Claimant testified he was hospitalized for a stomach virus; when asked why the doctor admitted him for chest pains Claimant said he also had chest pains, and that his doctor "found something like blocking, but he a wire inside and clean out, like a vein or something." However, Dr. Montalvo's notes indicate no blockages were found. (See Tr. 113-114; EX 17 p. 8).

Claimant also testified his knee was swollen when he went to the first aid station after his accident. When asked why the first aid attendant noted no swelling or bruising,

Claimant retracted his statements, clarifying that his knee did not become swollen until after he left first aid. When asked why Dr. Manale noted no swelling or bruising one week later, Claimant explained it was because he had been icing and elevating his knee at home. Claimant testified he returned to first aid every three days, but then stated he was too busy at work to go to first aid as requested. He also stated the first aid attendant gave him Vicodin, when they actually prescribed him Naprosyn. Claimant testified he attended the physical therapy prescribed by Dr. Manale and attempted to do all the exercises asked of him. This contradicts the Advantage Physical Therapy reports that he refused to do his exercises on at least 5 occasions. (See EX 10).

Additionally, Claimant testified Dr. Watermeier did not release him to work. He then disputed Employer's allegation Dr. Watermeier had released him to light duty, but admitted he hired a new lawyer after he was released to light duty. Claimant also testified he was released from Dr. Watermeier's care for an unknown reason, then because of a disagreement he had with the staff, and finally he testified he was released because he was not cooperative. Claimant also testified his medications, Vicodin and Elavil, made him dizzy and drowsy, although there is no mention of this in the medical records. He stated that between October, 2002, and May, 2003, he had no doctor and was taking no medications, but then he testified he had taken medications for the two years following his accident, causing him stomach irritation.

While Claimant's testimony was at times inconsistent and contradictory, it does not render his entire testimony incredible. Employer has not shown sufficient evidence of intentional deception or unreliable testimony on behalf of Claimant to support its contention he is incapable of telling the truth. However, I do note Claimant was forgetful and needed prompting on many occasions to remember events which took place in the past. Although I will not discredit the entirety of Claimant's testimony, I likewise will not rely solely on his testimony which is uncorroborated or otherwise contradicted by the weight of the record.

C. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d) (2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a) (2003). Should the employer carry its burden of production

and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 2(2) of the Act defines “injury” as “accidental injury or death arising out of or in the course of employment.” 33 U.S.C. § 902(2)(2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary. . .

(a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a)(2003).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O’Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee’s injury arose out of employment. *Hunter*, 227 F.3d at 287. However, “the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer.” *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). See also *Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

(1)(a) Existence of Physical Harm or Pain

To show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C.Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998)(pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995)(pre-existing back injuries).

In the present case, Claimant was diagnosed with synovial plica syndrome and mild chondromalacia in the left knee. His treating doctors, Dr. Watermeier and Dr. Bourgeois, as well as Dr. Sanchez and Dr. Murphy all opined these conditions could have been aggravated by his accident. No doctor reported objective physiological findings to support the existence of a contusion and all four testifying doctors commented an aggravated plica should have caused only minor pain for no more than 12 weeks. Nonetheless, Drs. Watermeier, Bourgeois, Sanchez and Murphy related his condition to his work accident of July 30, 2001, in light of the fact Claimant had no prior history of knee complaints. I find this is sufficient to establish a harm occurred to Claimant's left knee.

(1)(b) Establishing that an Accident Occurred in the Course of Employment, or that Conditions Existed at Work, Which Could Have Caused the Harm or Pain

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what might have been.'" *Wheatley*, 407 F.2d at 313. A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990)(finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980)(same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding ALJ ruling

that the claimant did not produce credible evidence a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief).

In the present case, Employer does not dispute Claimant was hit in the knee by a chair which his supervisor threw on July 30, 2001. Although there were no objective signs of injury recorded by the first aid station on the date of the injury, or by Dr. Manale one week later, Claimant voiced consistent complaints of pain from that date. Claimant also had difficulty performing physical therapy. None of the doctors or physical therapists was willing to discredit Claimant's complaints of pain, even though they were completely subjective in nature; as such, I am hesitant to ignore their opinions relating Claimant's pain to his work accident. Therefore, Claimant has established a work incident occurred which could have caused his injury and pain and in doing so has invoked the Section 20(a) presumption that his work accident was the cause of his injury.

(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). To rebut the presumption of causation, the employer is required to present *substantial evidence* that the injury was not caused by the employment. *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). The Fifth Circuit described *substantial evidence* as a minimal requirement; it is "more than a modicum but less than a preponderance." *Ortco Contractors, Inc., v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003). The Court went on to state an employer does not have to rule out the possibility the injury is work-related, nor does it have to present evidence unequivocally or affirmatively stating an injury is not work-related. "To place a higher standard on the employer is contrary to statute and case law." *Id.* at 289-90 (citing *Conoco, Inc.*, 194 F.3d at 690). See *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

In the present case, Employer asserts there is no objective medical evidence to support Claimant's claim of a knee injury. The first aid station did not report any bruising

or swelling of Claimant's left knee the day of his injury. One week later, Dr. Manale noted no swelling or bruising, and reported Claimant had full range of motion in his left knee. X-rays were normal, as was the MRI taken one month after Claimant's accident. Claimant's performance in physical therapy was inconsistent, with multiple notations that he guarded his knee or refused to even try to perform the exercises. In a second opinion examination on October 31, 2001, Dr. Sanchez found no evidence of an injury and released Claimant to full duty work. Dr. Manale, Dr. Watermeier and Dr. Montz all gave Claimant the benefit of the doubt and recommended a diagnostic arthroscopy, which Dr. Watermeier performed on April 29, 2002. The arthroscopy was negative, revealing very little chondromalacia and a plica which Dr. Watermeier testified were normal in appearance. Despite the lack of swelling of Claimant's plica, Dr. Watermeier removed it and diagnosed him with synovial plica syndrome, a condition consistent with Claimant's pain.

Not one of the six orthopedic surgeons who examined Claimant's left knee was able to find objective physiological evidence of a contusion. Drs. Watermeier and Montz opined that even if Claimant's accident aggravated his plica syndrome, the pain should have resolved in 12 weeks. Dr. Murphy testified the pain would have resolved within 8 weeks and the fact Claimant worked for one week immediately following his accident indicates his injury probably did not cause his knee pain. Moreover, Dr. Sanchez testified an aggravated chondromalacia or plica would not cause pain as severe as Claimant's.

Dr. Montz was the only doctor who did not relate Claimant's chair incident to an aggravated plica or chondromalacia. Dr. Montz testified it was highly unlikely that the two were related, and only stated a contusion *could* aggravate pre-existing plica or chondromalacia; he stopped short of opining this was what happened in Claimant's case. He supported his opinion with the overwhelming lack of objective medical evidence of a trauma and physiological findings to support Claimant's complaints of pain. Thus, Employer has presented sufficient evidence to rebut Claimant's Section 20(a) presumption.

(3) Causation on the Basis of the Record as a Whole

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co.*, 227 F.3d at 288; *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281.

In the present case, there is no objective medical evidence to support Claimant's assertion his knee injury was the result of being struck with a chair. Claimant worked heavy manual labor for one week following the accident. There was no swelling, bruising or decreased range of motion in the days following his accident and physical therapy and medical reports indicated Claimant guarded his knee and inhibited the completion of medical examinations. X-rays and MRIs were all unremarkable, and the diagnostic arthroscopy failed to aid the doctors in their diagnosis of Claimant's condition. Five orthopedic surgeons testified Claimant's pain was unjustified and should have resolved within 4 months of the accident, or by November 30, 2001. Also pertinent to the veracity of Claimant's claim for benefits are the facts that he has hired multiple lawyers to handle his claim, became quite upset upon discovering his August 30, 2001 MRI showed no abnormalities and sued Dr. Montz for trying to interfere with his claim.

However, the only orthopedic surgeon who unequivocally testified Claimant's injury was not related to his work accident was Dr. Montz, an IME who only saw Claimant once. As such, I find his opinion is not sufficient to outweigh those of Claimant's two treating doctors, Dr. Watermeier and Dr. Bourgeois, as well as Dr. Sanchez and Dr. Murphy, who all testified Claimant's contusion aggravated his pre-existing conditions. These four doctors related the incident with Claimant's condition on the basis of his consistent complaints of pain and negative history for prior injuries. Additionally, the accident itself is not contested by Employer; I find it rational to believe some harm would come to one's knee when struck with a chair.

Most importantly, in January, 2002, Dr. Aristimuno diagnosed Claimant with depression secondary to his work accident. This was noted by Dr. Watermeier, Dr. Sanchez and Dr. Bourgeois in their medical records. Dr. Montz testified depression may inhibit the healing process and Dr. Murphy noted complaints of chronic pain, such as Claimants', often have a psychological overlay. He even suggested Claimant try taking Elavil, which is a mild anti-depressant which sometimes helps with pain. Although Employer did not contest, Dr. Aristimuno's diagnosis of depression, neither party developed this argument at hearing or in post-hearing briefs. While it is not within my power to diagnose a claimant I nonetheless find Claimant's depression may be a contributing factor to his knee pain. It may very well explain why he did not respond to medications or physical therapy, or why he continues to complain of severe pain more than two years after his accident.

Thus, despite the lack of objective medical evidence, I find the totality of the evidence in this matter weighs in favor of Claimant. Employer does not contest that Claimant was hit in the knee by a chair and four out of five doctors related his knee injury to the accident. Two doctors suggested Claimant's depression may have contributed to his chronic pain complaints. As such, I find Claimant's work accident of July 30, 2001, caused his subsequent knee injury and chronic pain.

D. Nature and Extent of Claimant's Disability

Disability under the Act is defined as “incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment.” 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by the nature (permanent or temporary) and the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metro. Area Transit Auth.*, 13 BRBS 446 (1981).

In the present case, no doctor has suggested Claimant has reached MMI in his left knee. Dr. Watermeier and Dr. Murphy recommended further physical therapy and medications in June and October 2002, respectively. Dr. Montz testified Claimant should have reached MMI one year post-surgery, but clarified he has not reached MMI because he continues to have constant complaints of pain. Furthermore, Dr. Bourgeois is of the opinion Claimant needs further medical attention, including physical therapy and medications, to improve his knee condition. Employer has not asserted Claimant reached MMI at any point. Thus, based on this medical evidence, I find Claimant has not yet reached maximum medical improvement. I find he is temporarily disabled as of August 9, 2001 and continuing.¹²

¹² Claimant testified, and the record reflects, he worked one week following his July 30, 2001 accident. He stopped work on August 8, 2001 and first saw Dr. Manale on August 9, 2001. As

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former Longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In the present case, it is undisputed Claimant cannot return to his prior job as an outside machinist. In a February 25, 2002 letter to Employer, Dr. Manale opined Claimant is disabled from his customary job of outside machinist. Only Dr. Sanchez released Claimant to full duty work on October 31, 2001. However, Dr. Sanchez only saw Claimant once early on in his injury, and did not testify as to whether that opinion would stand considering Claimant's current condition. As such, I do not place much weight in his opinion. Dr. Watermeier and Dr. Montz both placed physical restrictions on Claimant's activity which preclude him from performing heavy manual labor; Dr. Murphy released Claimant to light duty work in September, 2002, and Dr. Bourgeois released Claimant to sedentary work in May, 2003. Therefore, five of six orthopedic surgeons agree Claimant is unable to perform this work and is totally disabled. I thus find Claimant has established a *prima facie* case of total disability as of August 9, 2001.

C. Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits

Claimant worked his normal job at his normal rate of pay for this week, I will use August 9, 2001, as the date his disability began.

for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

In the present case, Employer informed Claimant on July 26, 2002, that it had light duty work available to him if he reported to work within five days. (CX 18). Claimant reported to Employer on August 1, 2002, but due to his medications he was not re-hired.¹³ Claimant went to Employer again on October 1, 2002, but was denied work a second time due to his medications. This was not disputed by Employer.

Employer then retained Dot Moffett-Douglas to conduct Labor Market Surveys and locate suitable alternative employment for Claimant. Moffett-Douglas prepared two reports dated May 22, and September 30, 2003, locating a total of 13 jobs which were considered light duty and suitable for Claimant. Moffett-Douglas testified she did not seek approval of these jobs from any of Claimant's doctors, although she took into consideration Claimant's physical restrictions and medical condition when searching for jobs. In her first Survey she located four jobs in Claimant's geographical location which were all available to Claimant May 22, 2003. These positions were a valet driver, cashier, deli worker and security officer; each was considered light duty work. Moffett-Douglas updated this report in July, 2003, locating three jobs which were available to

¹³ Claimant testified Employer would not let him work while taking Vicodin or Vioxx. There is nothing in the record to contradict this testimony, and indeed Employer sent him another letter November 11, 2002, threatening to remove him from active payroll if he did not submit updated medical records. This supports Claimant's testimony that Employer was unable to provide him a job on August 1, 2002. (See CX 18; CX 24).

Claimant July 17, 2003. These positions included a bellman, room monitor and shuttle bus driver. In her September 30, 2003 report, Moffett-Douglas found four jobs available to Claimant on July 3, 2003, including a driver/cashier, security officer and automobile detailer. Jobs which were available September 1-6, 2003, included a parking booth attendant and cashier.

Claimant testified he could not perform many of these jobs because his medications make him drowsy and dizzy. However, I note Claimant's medical records are void of any complaints about the negative side effects of his medications. This leads me to believe his medications were not causing him trouble, or there would be notation of it in the records. Claimant testified he received the first Labor Market Survey in July, 2003, identifying jobs as valet driver, cashier, deli worker, security officer, bellman, room monitor and shuttle bus driver. Claimant testified he applied to each of these jobs but they were unavailable to him. He also testified he was incapable of performing the valet job because he could not park the cars and run back to the entrance for the next car. Similarly, he could not physically perform the bellman position because he could not lift the guests' luggage.

Claimant testified he also sought out the jobs listed in Moffett-Douglas' September 30, 2003 report, however when asked to clarify which jobs he applied to, he testified he reapplied to the same jobs that were listed in her July, 2003, report. (Tr. 94-95). Claimant did not testify he applied to the driver/cashier, security officer or automobile detailer positions. Additionally, Moffett-Douglas located four more jobs on the day of the hearing which were available and suitable for Claimant according to Dr. Watermeier's restrictions.¹⁴ This exhibits Employer's continuing efforts to locate suitable alternative employment. I find Employer has satisfied its burden of establishing suitable alternative employment as of July 3, 2003, and Claimant is entitled to temporary partial disability benefits as of this date.

Temporary partial disability which results in a decreased earning capacity is computed by taking 2/3 of the difference between what the claimant average weekly wage at the time of his injury and what he is capable of earning per week after the injury. Temporary partial disability shall not be paid for a period longer than five years. 33 U.S.C. § 908(e). When an employer presents several different jobs that are available to a claimant, or when a claimant has worked several different jobs, it is appropriate to average the earnings to arrive at a fair and reasonable estimate of the claimant's earning potential. *Avondale Industries, Inc., v. Pulliam*, 137 F.3d. 326, 328(5th Cir. 1998)(finding

¹⁴ Dr. Bourgeois released Claimant to sedentary work in May 2003. However, this is not corroborated by the totality of the evidence, as all other doctors have either released Claimant to light duty work or assigned physical restrictions limiting him to light duty work. As I have questioned the veracity of Dr. Bourgeois' medical opinions given his limited medical records, I do not place great weight on his restriction of sedentary activity.

that averaging several jobs offered by an employer was appropriate because the court has no way of determining which job the claimant will obtain and the average wage reflects all those jobs that are available); *Shell Offshore Inc., v. Cafiero*, 122 F.2d 312, 318 (5th Cir. 1997) (holding that averaging was a reasonable method to calculate a claimant's post-injury earning capacity); *Louisiana Insurance Guaranty. Ass'n v. Abbott*, 40 F.3d 122, 129 (5th Cir.1994) (finding that averaging salary figures to establish earning capacity was appropriate and reasonable).

In the present case, Employer has presented a total of nine jobs which I have found to be suitable alternative employment for Claimant. The average wages are \$5.53 per hour, or \$221.20 per week. This results in a loss of wage earning capacity of \$342.68 per week.

D. Medical Benefits

Section 7(a) of the Act provides “the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require.” 33 U.S.C. § 907(a). However, under § 7(d)(1), an employee is not entitled to reimbursement for medical treatment or services unless:

(A) his employer refused or neglected to provide them and the employee has complied with subsections (b) and (c) and the applicable regulations, or

(B) the nature of the injury required the treatment and services and, although his employer . . . knew of the injury, [it] neglected to provide or authorize them.

(1) Entitlement to Post-Operative Treatment

The Board has interpreted § 7(a) to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989); *Wheeler v. Interocean Stevedoring*, 21 BRBS 33 (1988); *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984). The presumptions of Section 20 apply in a determination of the necessity and the reasonableness of medical treatment. 33 U.S.C. § 920; *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert denied*, 528 U.S. 809

(1999)(finding a difference of opinion among physicians concerning treatment and deciding the issue based on the whole record); *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984).

(a) Establishing a *Prima Facie* Case of Reasonableness and Necessity

A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988). In the present case, Claimant contends he is entitled to medical benefits following his arthroscopy, including physical therapy and medication. Dr. Watermeier testified he would continue to recommend physical therapy and medications for Claimant, as he did in June 2002 following the arthroscopy. He testified Claimant should be under the care of an orthopedic surgeon to manage his medications. Mr. Labbe also testified physical therapy is important post-surgery to help the healing process. Dr. Montz testified physical therapy is a reasonable and necessary part of surgery. Additionally, Dr. Murphy testified physical therapy is important to healing and recommended Claimant undergo physical therapy and pharmaceutical treatment. Finally, Dr. Bourgeois has recommended medications and treatment. Claimant's orthopedic surgeons are in vast agreement that Claimant should be receiving physical therapy and medications as a reasonable and necessary part of surgery. Thus, Claimant has established a *prima facie* case for these treatments, post surgery.

(b) Rebuttal of the Presumption

Once a claimant establishes a *prima facie* case, the employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975). The Fifth Circuit uses a substantial evidence test in determining if an employer presented sufficient evidence to overcome a Section 20 presumption. *See Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999)(stating that "[o]nce the presumption in Section [20] is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related"). Here, the record is devoid of any indication physical therapy and medications are not a reasonable and necessary part of surgery. Employer did not contest this issue in its Post-Hearing Brief. As such, it has failed to rebut Claimant's *prima facie* case that the treatment is necessary and reasonable to the care of his work-related injury. Therefore, I find Claimant is entitled to receive the

requested physical therapy and medications as deemed necessary and reasonable to his recovery by his choice of treating physician.

(2) Claimant's Choice of Physician and Employer's Refusal to Treat

When an employer learns of its employee's injury, it must authorize medical treatment from the employee's own choice of physician. 33 U.S.C. §§ 907(b), (c)(2). When a claimant's choice of physician retires or otherwise withdraws from the practice of medicine the claimant need not seek authorization for further treatment by another doctor. However, where a claimant's choice of physician refuses to provide further medical treatment, the claimant is not relieved of the obligation to request another choice of physician of his employer under Section 7(b). *Slattery Associates, Inc., v. Hartford Accident & Indemnity Co*, 725 F.2d 780, 786 (D.C. Cir. 1983). When the employer refuses to authorize further medical treatment upon request and the claimant thereafter procures necessary and reasonable medical treatment, the employer must bear those expenses. 33 U.S.C. § 907(d) (2002); *Rogers Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 692-93 (5th Cir. 1986); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007, 1009 (1981).

In the present case, Employer authorized treatment by Claimant's first choice of physician, Dr. Manale, as well as Dr. Watermeier who took over Dr. Manale's practice upon his retirement. After Claimant's arthroscopic surgery, he requested authorization for physical therapy and medication as prescribed by Dr. Watermeier, but Employer refused to pay for these treatments. Similarly, Claimant requested authorization to see Dr. Bourgeois in May 2003 for treatment of his work injury, which Employer also denied. I have already found physical therapy and pharmaceutical treatment to be reasonable and necessary to Claimant's healing process. Employer does not contend Claimant did not seek authorization for these treatments, or that it did not refuse said treatments. As such, I find Claimant is entitled to medical benefits for any unpaid portion of his treatment with Dr. Watermeier as well as any reasonable and necessary treatment provided by Dr. Bourgeois.

E. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits

Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, rev'd on other grounds, sub nom. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that " . . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)." This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Co., et. al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since a proper application for fees has not been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from August 9, 2001, to July 3, 2003, based on a stipulated average weekly wage of \$563.88 and a corresponding compensation rate of \$376.11.

2. Employer shall pay to Claimant temporary partial disability compensation pursuant to Section 908(e) of the Act for the period from July 4, 2003, to present and continuing, based on a stipulated average weekly wage of \$563.88, a residual wage earning capacity of \$221.20 per week and a corresponding compensation rate of \$228.57.

3. Employer shall be entitled to a credit for the temporary total disability compensation paid to Claimant under Sections 908(b) of the Act.

4. Employer shall reimburse Claimant for all medical expenses incurred after May 13, 2002, and pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE